NO. 20551

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT DULAINE,

Plaintiff and Appellant,

vs.

UNITED STATES OF AMERICA,

Defendant and Respondent.

APPELLANT'S CLOSING BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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TOPICAL INDEX

TABLE OF AUTHORITIES

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PRELIMINARY STATEMENT

The Appellee, in its brief, sets forth three issues which this Court is called upon to determine. Appellant's brief will treat with his position on those issues presented by the Appellee.

I

DO APPELLANT'S ASSERTIONS IN HIS AFFIDAVIT IN OPPOSITION TO APPELLEE'S MOTION FOR SUMMARY JUDGMENT CREATE A GENUINE, MATERIAL FACT WHICH WOULD, THEREFORE, HAVE TO BE DISPOSED OF AT A TRIAL?

The foregoing query must be answered in the affirmative.

The two-year Statute of Limitations under the Federal Tort

Claims Act (28 U. S. C. §2401(b)) began to run when the Appellant discovered, or, when in the exercise of reasonable diligence, Appellant should have discovered, the acts constituting the alleged malpractice. Brown v. United States, 353 F. 2d 578.

The question now presented is when did the Appellant discover, or, in the exercise of reasonable diligence, should he have discovered, the acts constituting the alleged malpractice? The Appellant states under oath in his Affidavit in Opposition to Motion for Summary Judgment (Clk. Tr. pp. 25-34), and as is set out in his Opening Brief, pages 5 to 9, that he was not aware of the malpractice until he learned the true facts late in November 1962, when his medical record of the Veterans Administration Hospital was released to him and he was able to examine the medical records. It is academic that facts asserted by the party opposing the Motion for Summary Judgment supported by affidavits or other evidentiary material, must be taken as true. Janek v. Celebrezze, 336 F. 2d 828; Kilfoyle v. Wright, 300 F. 2d 626.

In support of Appellee's Motion for Summary Judgment, Appellee alludes to a letter dated March 26, 1957, attached as Exhibit "A" to Request for Admissions #1. If, in fact, the Appellant made admissions in said letter which are inconsistent with the statements in his affidavit, concerning the time Appellant discovered the acts constituting the alleged malpractice, this situation, the Courts say, do no more than raise an issue of fact, which makes a trial necessary. Eagle Oil & Refining Co. v. Prentice, 19 Cal. 2d 553.

The contraverted allegations as to when Appellant discovered, or, in the exercise of reasonable diligence, should have discovered the acts constituting the alleged malpractice, can only be resolved by a trial on the merits, and not by summary judgment. Free v. Bland, 369 U.S. 663; Sheets v. Burman, 322 F.2d 277; R. J. Reynolds Tobacco Company v. Hudson, 314 F.2d 776.

II

DOES THE RECITAL OF FACTS CONTAINED IN THE MEDICAL RECORDS IN APPELLEE'S AFFIDAVIT IN SUPPORT OF APPELLEE'S MOTION FOR SUMMARY JUDGMENT VIOLATE THE HEARSAY RULE?

The foregoing must be answered in the affirmative.

Rule 56(e) provides that supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify as to the matters stated therein. Jameson v. Jameson, 176 F.2d 58.

In support of Appellee's Motion for Summary Judgment, Morton H. Boren, an Assistant United States Attorney, filed his affidavit (Clk. Tr. p. 22), wherein he states,

"2. That he has reviewed the medical records of the Veterans Administration relating to the medical treatment rendered to plaintiff.

"3. That the plaintiff's medical records contain the following facts:

"(a) That on February 2nd, 1959, the plaintiff was discharged as a patient from the Veterans Administration Hospital, West Los Angeles, California,

"(b) . . . .

"(c) . . . ."

It is obvious that the Assistant United States Attorney cannot competently testify as to what the Appellant's medical record discloses. It is also obvious that a recitation in the affidavit of Morton H. Boren as to what Appellant's medical records contain, are merely hearsay statements which will not be considered in determining the Motion for Summary Judgment. Dyer v. MacDougal, 201 F. 2d 265; Jameson v. Jameson, 176 F. 2d 58.

The medical records of the Appellant are the best evidence of what the records contain, and should have been submitted with the affidavit of the Custodian of Records of the Veterans Administration Hospital, indicating that the records submitted are the records of the Veterans Administration Hospital, and are the medical records of the Appellant.

III

DID THE DISTRICT COURT RELY ON THE ALLEGED HEARSAY IN GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT?

The foregoing question must be answered in the affirmative.

As above set forth, the affidavit of Morton H. Boren contains the fact taken from the Appellant's medical records, that "on February 2nd, 1959, Appellant was discharged as a patient from the Veterans Administration Hospital, West Los Angeles, California". The District Court, in granting the Motion for Summary Judgment and in making its Findings of Fact and Conclusions of Law, stated in Finding No. V, that "on February 2nd, 1959, plaintiff was discharged as a patient from the Veterans Administration Hospital at Sawtelle, California". This fact was not disclosed in any affidavit other than the affidavit of Morton H. Boren, alluded to above. It is further evident that the District Court did rely on said alleged hearsay in granting Appellee's Motion for Summary Judgment.

IV

CONCLUSION

On appeal from a Summary Judgment, the Court of Appeals should view the case from a standpoint most favorable to the Appellant, and accept his allegations of fact as true, and assume a state of facts most favorable to him. Carr v. City of Anchorage, 243 F. 2d 482; Weisser v. Mersam Shoe Corp., 127 F. 2d 344; Billeaudeau v. Temple Associates, 213 F. 2d 707.

On appeal from a summary judgment, the only question is whether the allegations of the party against whom it was rendered, were sufficient to raise a material or genuine issue of fact.

Dunnington v. First Atlantic Bank, 195 F. 2d 1017.

The Court must accept as true the statement contained in Appellant's affidavit in opposition to the Motion for Summary Judgment, that he did not discover the alleged malpractice until the latter part of November 1962. That contraverted fact raises an issue of fact which can only be resolved by the trial on the merits and not by summary judgment.

Judgment should be reversed so that the Appellant may have his day in Court.

Respectfully submitted,

JAFFE, OSTERMAN & SOLL

By: F. FILMORE JAFFE

Attorneys for Appellant.

CERTIFICATE

I certify in connection with the preparation of this brief that I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ F. Filmore Jaffe

F. FILMORE JAFFE